(16,233.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, AND WILLIAM P. FORBIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1897.

* * * * * * *

01-7 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GENZberger, James W. Forbis, and William P. Forbis, Plaintiffs,
vs.
WILLIAM A. CLARK, JOSEPH K. CLARK, Henry S. Clark, and William Woodward, Defendants.
} Amended Complaint.

Now comes the above-named plaintiffs, by leave of court first had and obtained, and files this their amended complaint and complain of the above-named defendants, and for cause of complaint allege—

That the above-named plaintiffs and the defendants William A. Clark and Joseph K. Clark are now and at all times hereinafter named were the owners of the following-described property, situated in the "Summit Valley" mining district, in Silver Bow county, State of Montana, to wit:

08 That portion of that certain quartz lode mining claim known as and called the "Niagara" Lode mining claim and designated as lot numbered two hundred and seventy-nine (279), in township numbered three (3) north of range numbered seven (7) west, which is described as within the following metes and bounds, to wit: Beginning at corner No. 1 of survey No. 1945, the said Niagara lode, lot No. 279 aforesaid, from which the quarter-section corner on the west boundary on section six (6), T. 3 N., R. 7 W., bears north 51 11′ west 2,786.2 feet, and running thence south 3 53′ east 336 feet to corner No. 2 of said Niagara lode, said corner No. 2 being on the west end line of survey No. 596, the Black Rock lode, lot No. 53; thence north 2 west along the west end line of said Black Rock lode 259 feet to corner No. 4 of said Black Rock lode; thence south 77 15′ east along the north side line of said Black Rock lode 1,283.5 feet; thence north 0 17′ west 394 feet to a point on the fourth course of said Niagara lode; thence north 88 05′ west along the fourth course of said Niagara lode 190.25 feet to corner No. 5 of said Niagara lode, said corner No. 5 being on the south side line of survey No. 1568, the Damarat lode, lot No. 223; thence south 78 west along said south side line of said Dama-

09 rat lode 741 feet to corner No. 3 of said Damarat lode; thence north 1 30′ east along the west end line of said Damarat lode 9.5 feet to a point on the south side line of the Deadwood lode, survey No. 999, lot No. 111; thence north 73 15′ west along said south side line of said Deadwood lode 366 ft. to the place of beginning.

That the said property is held by the said plaintiffs and the said defendants, William A. Clark and J. K. Clark, in the following proportions as tenants in common, to wit, the said plaintiffs own-

ing altogether two undivided thirds (⅔) interest in the said property, and the said William A. Clark and Joseph K. Clark owning one undivided third (⅓) interest therein, each and all holding said property as tenants in common.

That the said Niagara Lode claim is a quartz lode claim and as such embraces a quartz vein the top or apex of which crosses the south line of the Niagara Lode claim 560 feet in a westerly direction from the northeast No. 1 corner of the Black Rock Lode claim, lot No. 53, in T. 3 N., R. 7 W., the said south line of the Niagara lode and the north line of the Black Rock lode at the point of the departure of the said vein being identical; and the said vein
010 from the said point of entering the south line of the said Niagara Lode claim continues, with its top or apex within the surface lines of the Niagara Lode claim, easterly until it crosses the end line of the said Niagara Lode claim, and that the said vein in its downward course or dip departs from within the surface lines of the said Niagara Lode claim into and under the said Black Rock Lode claim, which lies south of and adjoining the said Niagara Lode claim.

That heretofore, to wit, on or about the 1st day of March, 1890, as plaintiffs allege on information and belief, the said defendants without plaintiffs' consent, by underground workings, levels, winzes, stopes, and shafts, entered upon the said vein upon its downward course or dip, began to extract and ever since have continued to extract and are now extracting therefrom large quantities of ore, which at the date of the commencement of this action amounted in value to the sum of two hundred and thirteen thousand dollars, and which ore was extracted from the vein hereinbefore described upon its downward course or dip and on that portion thereof which has its apex upon the "Niagara" Lode claim, hereinbefore described.

011 That the plaintiffs, as tenants in common, as aforesaid, are entitled to two-thirds value of all ores extracted from the said vein, as hereinbefore set forth, which amounts to one hundred and forty-two thousand dollars ($142,000).

That the defendants, after extracting said ore from the said vein as aforesaid, converted the same to their own use, and ever since have held and now hold the proceeds thereof to their own use and fail and refuse to account to these plaintiffs for the same or any part thereof, although requested so to do, and still continue, against plaintiff's will and consent, to extract ore from said vein as aforesaid on its downward course or dip, both within and without the vertical side lines of the said Niagara Lode claim.

That by reason of the said acts as aforesaid these plaintiffs have been damaged in the sum of one hundred and forty-two thousand dollars.

Wherefore plaintiffs pray judgment against the said defendants for the sum of one hundred and forty-two thousand dollars, with legal interest thereon from the 1st day of March, 1890, and for costs of suit herein expended, and further for the value of two-thirds (⅔)

of all ores extracted from said vein during the pendency of
012 this action, and that that portion of the vein hereinbefore described the top or apex of which lies within the side lines of the said Niagara Lode claim and of its dips, spurs, and angles be adjudged and decreed the property of these plaintiffs, as such tenants in common, and that defendants be adjudged and decreed to account to these plaintiffs for all ores extracted therefrom prior to the commencement of this action and during the pendency thereof, and for other and further relief.

(Signed) JOHN F. FORBIS,
Attorney for Plaintiffs.

STATE OF MONTANA, } ss:
County of Silver Bow, }

James W. Forbis, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

(Signed) JAMES W. FORBIS.

Subscribed and sworn to before me this 9th day of August, 1892.

(Signed) CHAS. MATTHISON,
Notary Public.

013 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, James W. Forbis, and William P. Forbis, Plaintiffs,
vs.
WILLIAM A. CLARK, JOSEPH K. CLARK, Henry S. Clark, and William Woodward, Defendants.

Answer of W. A. Clark to Amended Complaint.

Now comes the above-named defendant, William A. Clark, and for his separate answer to the amended complaint of plaintiffs on file herein—

Denies that the lode or vein described by plaintiffs in said complaint crosses the south line of the Niagara Lode claim 560 feet in a westerly direction from the northeast No. 1 corner of the Black Rock Lode claim, but avers that said vein crosses the south line of the Niagara Lode claim about 200 feet in a westerly direction from the northeast No. 1 corner of said Black Rock Lode claim.

Denies that any lode or vein the top or apex of which is inside of the said Niagara Lode claim in its downward course or
014 dip departs from within the side lines of the said Niagara Lode claim into or under said Black Rock Lode claim, which lies south of and adjoining said Niagara Lode claim.

Denies that on the first day of March, 1890, or at any other time or at all this defendant, by underground workings, levels, winzes, stopes, shafts, or otherwise or at all, entered into or upon any vein, lode, or ledge the top or apex of which was or is inside the surface lines of said Niagara Lode claim upon its downward course or dip, or otherwise or at all, or at any time began to extract or ever since has continued to extract or is now extracting or was at the time of the commencement of this suit extracting from said vein large or any quantities of ore at all.

Denies that this defendant ever at any time by any means whatever extracted any quartz or ore from any vein or lode the top or apex of which lies within the boundaries of said Niagara Lode claim.

Denies that the value of any ore extracted by this defendant or any of the defendants in this suit from any vein the top or apex of which lies within the boundaries of said Niagara Lode claim at the commencement of this action or at any time at all amounted or now amounts in value to the sum of $213,000 or any sum
015 or amount at all.

Denies that plaintiffs as tenants in common or otherwise or at all are entitled to two-thirds in value or any other part or portion of any quartz or ore extracted by this defendant from the vein claimed by plaintiffs in said complaint or from any other vein or at all which amounted to $142,000 or any sum or amount whatever.

Denies that after extracting said or any ore from the vein described in plaintiffs' complaint this defendant converted the same or any part thereof to his own use, or ever since has held or now holds the proceeds of any ore at all in which plaintiffs have or ever had any interest at all, or fails or refuses to account to plaintiffs for any part thereof.

Denies that defendant still continues, against plaintiffs' will or consent or otherwise or at all, to extract ore from any lode or vein in its downward course or dip or at all the top or apex of which lies within the vertical side lines of said Niagara Lode claim.

Denies that by reason of extracting or converting any ore on any lode or vein the top or apex of which lies within the lines of
016 said Niagara Lode claim, or any veins in which plaintiffs have any interest, that plaintiffs are or have been damaged in the sum of $142,000 or any sum or amount whatever or damaged in any sum or amount at all by any act of this defendant.

Denies that plaintiffs have been damaged in any sum or amount whatever or at all by any act or acts of this defendant.

Defendant, further answering, avers the fact to be that said Niagara Lode claim was not located on or along the course or strike of any vein the top or apex of which lies within the lines of said lode claim, but was located across said veins and across the vein from which plaintiffs claim that defendants have extracted ore belonging to plaintiffs, and that by reason thereof the side lines of said Niagara Lode claim became and are the end lines of said Niagara Lode claim and should be drawn down vertically, and for

the reason that said side lines became the end lines of said lode claim plaintiffs have no right, in case said veins or any of them should upon their downward course or dip depart from the side lines of said Niagara Lode claim and under or into said Black Rock Lode claim, to follow the same in said downward course or dip into or under the side line of said Black Rock claim.

017 That the vein or lode from which plaintiffs claim the defendants in this suit mined and extracted the ore sued for and which embraces the supposed trespass had and has its top or apex within the side lines of said Black Rock Lode claim.

Denies that said plaintiffs or any of them, as owners or otherwise, were or are entitled to the vein or lode upon which the alleged trespass was committed, or are entitled to the same in its downward course outside of the side planes of the surface location of said Niagara Lode claim, drawn down vertically, or are entitled to any part or portion of the ore of said vein outside of the surface lines of said Niagara Lode claim, and especially that portion thereof from which it is alleged that the said quartz and ore was taken and removed by the defendants in this action.

And this defendant, for further answer and defense to said amended complaint and alleged trespass therein contained, avers that the defendants in this action are the owners of and entitled to the possession of said Black Rock Lode claim and all veins, lodes, and ledges therein, and all quartz, ore, or mineral bearing rock therein contained.

That at and before and continually during the time of the 018 alleged trespass this defendant had and held a lease from all the other defendants in this action to all their right, title, and interest in and to said Black Rock Lode claim, with all the veins, lodes, and ledges, the tops or apexes of which were within the lines of said Black Rock Lode claim, and rights, easements, and privileges thereto lawfully belonging; that as such lessee this defendant went into the actual possession of said Black Rock Lode claim, and was entitled to the possession of the same, with the right to mine and extract quartz, rock, or ore therefrom without let or hindrance from the other defendants in this suit, and was entitled to and did manage, mine, and conduct said Black Rock Lode claim during all the time of the alleged trespass set out in plaintiffs' complaint and long prior thereto, and has, before the commencement of this suit and before the time of the supposed trespass mentioned in said complaint, continually, as such lessee, mined and extracted quartz and ore from said Black Rock Lode claim, and particularly the quartz and ore mentioned in said complaint and which is claimed by plaintiffs, and which constitutes the supposed trespass set out in plaintiffs' complaint, and was to and has delivered to the 019 other defendants herein one-fourth of the proceeds of the ore mined and taken by this defendant from said Black Rock Lode claim in pursuance of said lease and terms thereof, and by reason thereof the other defendants in this suit are improperly joined with this defendant, and there is a defect or misjoinder of parties defendant.

That this defendant at the time of mining and extracting the ore from said Black Rock Lode claim, which constitutes the supposed trespass set out in plaintiffs' complaint, acted in good faith and then believed and still believes that all the said ore was mined and extracted from ledges or veins the tops or apexes of which lie inside of the said Black Rock Lode claim, and therefore in good faith, believing that the other defendants herein were entitled to one-fourth of the proceeds of the said ore as belonging to said Black Rock Lode claim, delivered the same to them according to their respective interests.

That the quartz or ore which constitutes the supposed trespass was mined and taken by this defendant from lodes or veins the tops or apexes of which lie within the surface lines of said Black Rock Lode claim drawn down vertically.

020 That if the vein described by plaintiffs in their complaint or any or all other veins the tops or apexes of which lie inside of the surface lines of said Niagara Lode claim in their des-ent or dip into the earth dip under or into the side lines of said Black Rock Lode claim drawn down vertically such veins unite with and become a part of the vein or lode from which this defendant mined and extracted the ore which constituted the supposed trespass, and the top or apex of which lies inside of the surface lines of said Black Rock Lode claim at a point below the places and points from which this defendant extracted most of said ores complained of and described in said complaint, and the balance of said ore was mined and extracted below the point of intersection of said veins.

That said Black Rock Lode claim is older and was located prior to said Niagara Lode claim, and that the patent for said Black Rock Lode claim was issued prior to the issuance of any patent for said Niagara Lode claim, and therefore all of said veins, whether their apex- *is* within the surface lines of said Niagara Lode Claim or not below said point of intersection above described, belong to and are the property of the defendants in this suit, and they are entitled to the possessson thereof and to all the ores therein

021 contained.

Wherefore this defendant, having fully answered said amended complaint and the cause of action sought to be set up therein, asks judgment for his costs and disbursements in this behalf expended.

(Signed) ROBINSON AND STAPLETON,
GEO. HALDORN,
Attorneys for Defendant Wm. A. Clark.

STATE OF MONTANA, }
County of Silver Bow, } *ss:*

William A. Clark, being first duly sworn, says as follows:

That he is the defendant in the above-entitled action answering in the above answer; that he has heard said answer read and knows the contents thereof, and the same is true of his own knowledge.

(Signed) WILLIAM A. CLARK.

Subscribed and sworn to before me this 30th day of November, 1892.

(Signed) G. W. STAPLETON,
Notary Public.

022 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GANZBERGER, James W. Forbis, and William P. Forbis, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants.
} Replication.

Now come the plaintiffs in the above-entitled action, and for replication to the separate answer of William A. Clark herein on file—

I. Deny that the vein described in the plaintiffs' complaint crosses the south line of the Niagara Lode claim at a point two hundred feet in a westerly direction from the northeast corner of the Black Rock Lode claim, but alleges that the said vein crosses as in the plaintiffs' complaint set forth.

II. Deny that the said Niagara Lode claim was not located on or along the course of strike of any vein the top or apex of which lies within the lines of the said Niagara Lode claim, or that the Niagara Lode claim was located across the veins described in plain-

023 tiffs' complaint.

But allege the fact to be that the said vein, although crossing the side line- of said claim, runs almost parallel therewith and in nearly the same direction.

Deny that by reason of the crossing of the said vein the side lines of the said Niagara Lode claim became or were the end lines of the said Niagara Lode claim, or that the same should be drawn down vertically, or that by reason of the course of the said vein the side lines of the said Niagara Lode claim became the end line- of the said location, or that plaintiffs have no right in case said veins or any of them should upon their downward course or dip depart from the side lines of the Niagara Lode claim and under or into the Black Rock Lode claim to follow the same in its downward course or dip into or under the side lines of the Black Rock Lode claim.

III. Deny that the vein or lode from which the defendants mined and extracted the ore sued for in this action has its top or apex within the side lines of the Black Rock Lode claim.

IV. Deny that the defendants in this action are the owners

024 or entitled to the possession of all veins, lodes, or ledges therein or all quartz, ore, or mineral-bearing rock therein contained.

But the plaintiffs allege wherever such veins have their top- or apex- outside of the Black Rock Lode claim that the defendants have no right to the said veins or the ore therein contained by virtue of the said Black Rock location.

V. Deny that the defendant, as lessee or otherwise, extracted the

quartz described in plaintiffs' complaint from the vein therein described under or by virtue of any lease from the co-owners in the Black Rock Oode claim, and deny that by virtue of any lease whatever executed by any person whatsoever the defendant had any right to mine or explore on the vein described in plaintiffs' complaint in that portion thereof having its apex within the Niagara Lode claim as described in plaintiffs' complaint.

Deny that the other defendants in this suit are improperly joined with the defendant W. A. Clark, or that there is any defect or misjoinder of parties defendant.

VI. Deny on information and belief that -he defendant is
025 extracting the ore from the vein described in plaintiffs' complaint acted in good faith or with the belief or still believes that all the said ore was mined or extracted from the ledges or veins the top- or apex- of which lie inside of the Black Rock Lode claim.

VII. Deny that the quartz or ore extracted from the vein described in plaintiffs' complaint was mined or taken by said defendant from lodes or veins the tops or apexes of which lie within the surface lines of the said Black Rock Lode claim drawn down vertically.

Deny that the vein described in plaintiffs' complaint or any other veins which have their top- or apex- within the surface lines of the Niagara Lode claim unite with or become a part of the vein or lode from which the defendant mined or extracted the ore claimed in plaintiffs' complaint the top or apex of which lies inside of the surface lines of the Black Rock Lode claim at any point whatever, or that if such veins do unite that the defendant extracted such ore below the point of intersection.

VIII. Deny that by reason of any priority or otherwise any vein having its top or apex within the surface ground of the Niagara Lode claim belongs to or is the property of the defendant in this suit below any point of intersection, or that the defend-
026 ants are entitled to possession of any such veins or ore contained therein.

Wherefore the plaintiffs, having fully replied, pray judgment as in their complaint prayed.

(Signed) JOHN F. FORBIS,
Attorney for Plaintiffs.

STATE OF MONTANA, } ss:
County of Silver Bow, }

James W. Forbis, being first duly sworn, says on oath that he is one of the plaintiffs in the above-entitled cause; that he has read the foregoing replication and knows the contents thereof, and that the facts therein stated are true except as to matters and things therein stated on information and belief, and as to such matters he believes it to be true.

(Signed) JAMES W. FORBIS.

Subscribed and sworn to before me this 10th day of March, 1893.

(Signed) WILLIAM J. NAUGHTEN,
Notary Public.

027 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

W. F. FITZGERALD *et al.*, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants. } Verdict.

We, the jury in the above-entitled action, find for the plaintiffs and assess their damage at the sum of twenty-nine thousand three hundred fifty-one and $\frac{1}{100}$ dollars ($29,351.01), being two-thirds of the value of ores extracted by the defendant W. A. Clark from the ground in controversy.

(Signed) W. T. BOARDMAN, *Foreman.*

Dated this — day of July, 1893.

028 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD *et al.*, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants. } Special Findings.

The jury will answer the following questions:

(1.)

Q. At what point on the line between the Black Rock and Niagara Lode claims does the apex of the vein in controversy pass entirely within the lines of the Niagara Lode claim?

A. At a point five hundred and thirteen feet (513 ft.) westerly from the northeast corner of the Black Rock Lode claim.

(Signed) W. T. BOARDMAN, *Foreman.*

(2.)

Q. What was the entire market value of ores extracted by
029 William A. Clark from the vein in controversy east of the point where such vein passes entirely within the Niagara Lode claim after deducting the cost of mining and hoisting such ore?

A. Forty thousand eight hundred sixty-three and $\frac{81}{100}$ dollars (40,863.81).

(Signed) W. T. BOARDMAN, *Foreman.*

030 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GANZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Plaintiffs,
vs.
WILLIAM A. CLARK, JOSEPH K. CLARK, HENRY S. CLARK, and WILLIAM WOODWARD, Defendants.

This action came regularly on for trial at the July, 1893, term of the above-entitled court upon the amended complaint of the plain-

tiff-, the separate answer of W. A. Clark and of J. K. Clark, H. S. Clark, and William Woodward thereto, and the plaintiffs' replications to the said separate answers.

A jury was regularly impanneled to try the cause, and testimony was introduced on the part of the plaintiffs and defendants, and the jury was regularly instructed by the court as to the law in the premises.

And it appearing from the separate answers that William A. Clark, one of the defendants, is the person responsible for the
031 tresspas- alleged in the said complaint, and the plaintiffs having in open court consented to hold William A. Clark and having disclaimed any claim of damage against any of the other defendants named in the said action—

The jury, after deliberating upon their verdict, subsequently came into court with a general verdict in favor of the plaintiffs and assessing their damages at the sum of $29,351.01, being two-thirds of the value of ores extracted by the defendant William A. Clark from the ground in controversy, and the jury also returned special findings to the effect that the apex of the vein in controversy passes entirely within the lines of the Niagara Lode claim at a point 513 ft. westerly from the northeast corner of the Black Rock Lode claim, and also that the entire market value of ores extracted by William A. Clark from the vein in controversy east of the point where such vein passes entirely within the Niagara Lode claim, after deducting the costs of mining and hoisting such ores, is the sum $40,863.81.

Whereupon it was ordered by the court that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, are the owners of two undivided thirds (⅔)
032 interest in the premises and of the vein as described in said verdict and special findings, and that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, do have and recover of the defendant William A. Clark two-thirds of the entire amount extracted by the said William A. Clark east of the line where the entire apex of the vein described in the complaint passes within the Niagara Lode claim; which entire amount as found by the said special findings is the sum of $40,863.81.

Wherefore, by virtue of the law and by reason of the premises, it is ordered and adjudged that the entire apex of the vein in controversy and described in the complaint passes entirely within the lines of the Niagara Lode claim at a point on the line between the Niagara and Black Rock Lode claims 513 feet westerly from the northeast corner of the Black Rock Lode claim.

And it is further ordered and adjudged that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, do have and recover of the defendant, William A. Clark, the sum of $27,242.54 (being two-thirds of the sum of $40,863.81), and that the plaintiffs do have and recover of the de-

fendant, William A. Clark, the further sum of two hun-
033–120 dred thirty-four and $\frac{50}{100}$ ($234.50) dollars costs incurred by the plaintiffs in this action.

(Signed) H. A. NEIDENHOFEN, *Clerk*,
By JAMES F. WILKINS,
Deputy Clerk.

Dated this 26th day of July, 1893.

* * * * * * *

0121 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Petition for Writ of Error.

To the honorable the supreme court:

Your petitioner, William A. Clark, plaintiff in error in the above-entitled cause, by his attorneys, Smith & Word, files this his petition for a writ of error against the defendants in error above named in the title of this cause, and complains that in the records and proceedings and in the rendition of judgment in the above-entitled cause in the supreme court of the State of Montana, the same being the highest court and court of last resort in said State, holden
0122 at the city of Helena, in said State of Montana, at the October term, A. D. 1895, to wit, on the 11th day of November, A. D. 1895, against the plaintiff in error, William A. Clark, and in favor of the above-named defendants in error, manifest error has been committed and hath intervened in said action, to the great damage and injury of your petitioner and plaintiff in error, William A. Clark.

And your petitioner further shows to this honorable court that in the above-entitled cause there is involved a Federal question and the construction of a statute of the United States, to wit, sections 2320 and 2322, chap. six, title 32, of the Rev. Stats. of the United States, entitled "Public lands;" that there is involved in said cause this question, to wit, whether a mineral claimant the apex of whose vein or lead passes through one end line and one side line of the surface lines of his claim or location as designated on the surface of the ground has any right to follow such vein on its dip or pitch into the earth outside of and beyond his own surface lines extended vertically downward and underneath the surface and within the side lines of another's claim, extended vertically downward.

And there is involved the further question in said cause whether, when the apex of a lead, lode, or vein of mineral passes
0123 through one end line and also through one side line of the surface location, as designated upon the surface of the ground, such lines, through which the apex of said vein passes, in effect become end lines; and whether, when such lines through which the

apex of the vein passes, not being parallel to each other, the claimants (being the defendants in error) or owners of such vein or lode whose apex passes through such end line and such side line has any extralateral rights or any right, under sections 2320 and 2322 of the Rev. Stats. of the United States, to follow such vein or lode on its dip or pitch into the earth outside of and beyond the surface lines of his said claim extended vertically downward and underneath and within the surface lines of the claim of plaintiff in error extended vertically downward.

That said questions are raised and presented by the pleadings in the above-entitled cause, and the honorable the supreme court of Montana at the date aforesaid held and decided and rendered a final judgment in said court, finding and declaring that the defendants in error, being the owners of an undivided two-thirds of the Niagara quartz lode claim, the apex of the vein of said claim
0123½ passing through the east end line of said claim and through the south line of said Niagara claim (said lines being almost at right angles to each other), had a right to follow so much of said vein as had its apex within the surface lines of said Niagara claim on its pitch or dip into the earth through the south and underneath the surface and within the lines of the Black Rock claim, extended vertically downward, said Black Rock claim being the property of your petitioner, the plaintiff in error.

Wherefore your petitioner and plaintiff in error prays for the allowance of a writ of error and for such other process as may cause the said judgment and proceedings to be corrected by the said Supreme Court of the United States.

ROBERT B. SMITH AND
ROBERT L. WORD,
Of Helena, Montana, Attorneys and Solicitors for the Plaintiff in Error.

0124 In the Supreme Court of Montana.

WILLIAM F. FITSGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Assignment of Errors.

The plaintiff in error, William A. Clark, through his attorneys and counsellors, makes the following assignment of errors in the above-entitled cause, heard and determined at the city of Helena, State of Montana, in the supreme court of said State, on the 11th day of November, A. D. 1895, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

0125 1.

It appears from the pleadings in the above-entitled cause that the defendants in error above named are the owners of an undivided

two-thirds of the Niagara quartz lode claim, and the plaintiff in error is the owner and in possession of the Black Rock quartz lode claim; and it further appears from said pleadings that the north side line of the Black Rock lode claim is also the south side line of the Niagara lode claim, owned in part by the defendants in error; and it further appears from the pleadings in said cause and from the judgment rendered therein that the apex of the vein or lode of the Niagara claim passes through the east end line of said claim and running thence westerly at a point 513 feet from the northeast corner of the Black Rock claim the apex of said vein or lode of the Niagara claim passes through the south side line of said Niagara lode or claim, and, notwithstanding such fact, the supreme court of the State of Montana decided that the defendants in error had a right to follow that portion of said vein which had its apex inside of the surface lines of the Niagara claim on its dip or pitch into the earth to the south, underneath and within the surface lines of the Black Rock claim extended vertically downward, claimed,
0126 owned, and possessed by the plaintiff in error, and in this the court erred.

2.

The said supreme court of Montana erred in deciding that where the apex of a vein, lode, or ledge passed diagonally through one end line and one side line of the Niagara claim, owned by defendants in error, that said defendants in error had a right to follow the said vein or lode on its dip into the earth outside of their surface lines extending vertically downward and into and underneath the surface and within the surface lines of the Black Rock claim extending vertically downward, the said last-named claim being owned and possessed by the plaintiff in error.

3.

The said supreme court of Montana erred in deciding that where the apex of a vein or lode crosses two surface lines of a mineral claim, which said lines are not parallel to each other, that the owners of such a vein or lead have the right to follow such a vein or lode on its dip into the earth underneath the surface and within the surface lines of an adjoining claim.

0127 4.

The said supreme court of Montana erred in disregarding that portion of section 2320 of the Rev. Stats. of the United States requiring the end lines of each location or claim to be parallel to each other.

5.

The said supreme court of Montana erred in refusing to hold that where the apex of a vein or lode crosses one end line and one side line of a claim such side line becomes in effect an end line.

6.

The said supreme court of Montana erred in refusing to follow the law as announced by the Supreme Court of the United States in case of King *vs.* Amy and Silversmith Co., 152 U. S., 222, construing section 2320 and 2322 of the Rev. Stats. of the United States.

7.

The said supreme court of Montana erred in attempting to lay down a rule by which the lines of a mining claim or mine
0128 can be readjusted so as to give the holder thereof extralateral rights and permit him to follow his vein on its dip into the earth without having parallel end lines crossed by the apex of the vein or lode.

ROBERT B. SMITH AND
ROBERT L. WORD,
Of Helena, Montana, Attorneys and Solicitors for Plaintiff in Error, William A. Clark.

0129 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana, before you or some of you, between William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, defendants in error, and William A. Clark, plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do
0130 command you, if the judgement be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the customs and laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

GEO. W. SPROULE,
[SEAL.] *Clerk of the Circuit Court of United States, Ninth Circuit, District of Montana.*

Allowed by—
WILLIAM Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Service of a copy of the foregoing writ is duly acknowledged, at Silver Bow county, Montana, this 26th day of December, A. D. 1895.

JOHN F. FORBIS,
Attorney and Solicitor for the Defendants in Error.

0131 Copy of the above writ this day left with me for service. Dated Dec. 24th, 1895.

BEN. WEBSTER, *Clerk*
(Per W. D. GARDINER).

0132 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis are defendants in error and William A. Clark in plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy
0133 justice should not be done to the parties in that behalf.

Witness the Honorable William Y. Pemberton, chief justice of the supreme court of the State of Montana, this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] WILLIAM Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the writ of error mentioned therein accepted and acknowledged at Silver Bow county, State of Montana, this December 26th, A. D. 1895.

JOHN F. FORBIS,
Attorney and Solicitor for Defendants in Error.

0134 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.
} Bond.

Know all men by these presents that we, William A. Clark, as principal, and Joseph K. Clark and James Ross Clark, as sureties, all of the county of Silver Bow, State of Montana, are held and firmly bound unto William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis in the full and just sum of fifty thousand dollars, to be paid to the said William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, their heirs, assigns, executors, administrators, or attorneys; to which payment, well and truly to be made, we bond ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

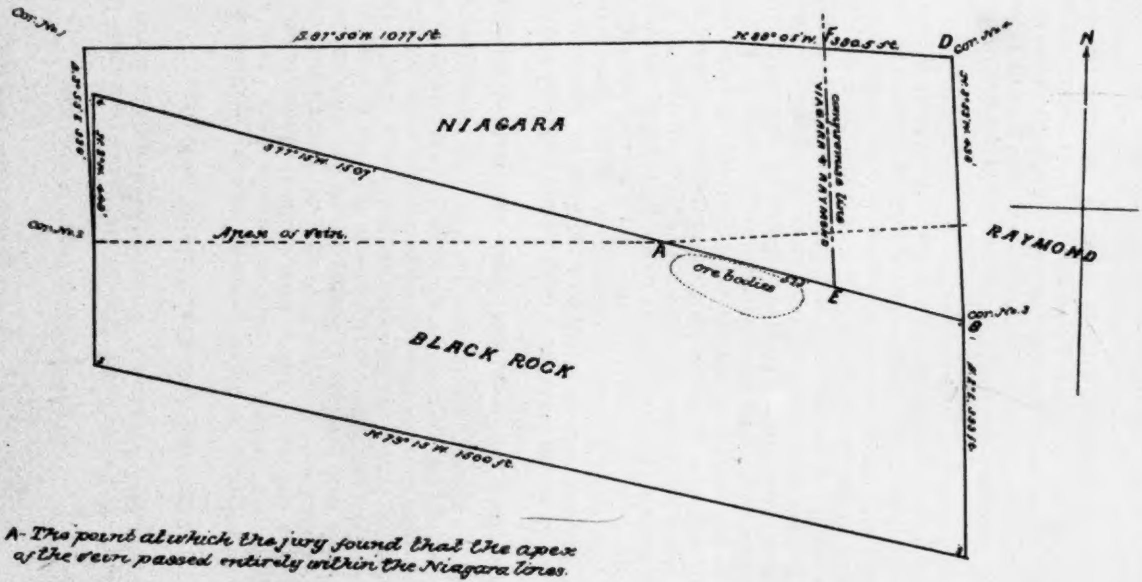
Sealed with our seals and dated this 10th of December, A. D. 1895.

Whereas lately, at a term of the supreme court of *of* the
0135 State of Montana, in a suit pending in said court between the said William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, plaintiffs and defendants in error above named, and William A. Clark, plaintiff in error *was* defendant, there was rendered on the 11th day of November, A. D. 1895, a final judgment in favor of the said plaintiffs in said action and against the defendant therein, the plaintiff in error herein, for more than five thousand doolars, to wit, the sum of $33,781.57, besides costs and interest from said date, and said defendant therein having sued out a writ of error from the Supreme Court of the United States to reverse the said judgment and lodged a copy of said writ in the clerk's office of the supreme co8rt of the State of Montana for inspection, and a citation directed to the said plaintiffs in said action, citing them and admonishing them to be and appear at a Supreme Court of the United States, holden at Washington, on the first Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea and shall pay or cause to be paid such sum as may be
0136 awarded against him by reason of the suing out of said writ

Clark v Fitzgerald et al } p.0137 a

Fig. 1



A- The point at which the jury found that the apex of the vein passed entirely within the Niagara lines.

of error, then the above obligation to be void; otherwise to remain in full force and virtue.

WILLIAM A. CLARK.
JOSEPH K. CLARK.
JAMES ROSS CLARK.

Signed in the presence of—
ARTHUR H. WETHEY.

Sufficiency of sureities and bond.
Approved December 20th, 1895.

WILLIAM Y. PEMBERTON,
Chief Justice of Montana.

0137 STATE OF MONTANA:

In the Supreme Court, October Term, 1895.

WILLIAM FITZGERALD *et al.*, Plaintiffs and Respondents,
vs.
WILLIAM A. CLARK *et al.*, Defendants and Appellants. } No. 529.

Submitted October 4th, 1895. Decided November 11th, 1895.

Statement of the Case by the Justice Delivering the Opinion.

The respondents own an undivided two-thirds interest in the Niagar- Quartz Lode mining claim. The defendant William A. Clark owns the other one-third in said claim. The appellants own the Black Rock Quartz Lode mining claim. The surface relations of the two mining claims are indicated upon the annexed diagram, marked "figure 1."

(Here follows diagram marked p. 0137*a*.)

It will be more convenient in this statement and in the opinion to sometimes speak of the parties to this appeal as the
0138 "Black Rock" and the "Niagara" instead of using their names or the terms "appellants" and "respondents."

The north side line of the Black Rock claim is the south side line of the Niagara claim. We do not purport to exactly indicate on the diagram the position of the apex of the vein as it traverses the two claims. The dotted line simply indicates the general course of the vein, and as far as the purposes of this decision are concerned is correct. The apex moves across the Black Rock claim from west to east and crosses the boundary lines between the two claims at a point marked A on the diagram, which is, as the jury found, 513 feet westerly from the northeast corner of the Black Rock, which corner is marked B on the diagram. The east end line of the Niagara was originally at the place marked B D. In some controversy between the Niagara and the Raymond claim to the east a compromise was made by which the boundary between those two claims was placed at a point about 224 feet westerly from the

original Niagara east end line. This was called the "compromise line," and would be at about the place as marked on the diagram E F. This, however, is not important in the present suit. The parallelism of the end lines of the Niagara was not disturbed by the Raymond compromise. The apex and strike of
0139 the vein, having crossed into the Niagara ground at the point marked A, continue easterly and pass wholly out of the Niagara ground through the easterly end line thereof. It is immaterial whether that end line is the line B D or E F. The strike and apex pass through each of them. The vein dips to the south. The portion of the apex which is represented by the line A G is wholly within the Niagara surface lines. The portion of the vein below this part of the apex in its downward course into the earth—that is to say, on its dip to the south—passes under the line H B, which is the north side line of the Black Rock and the south side line of the Niagara. We call this line a side line at present simply for convenience and not as a prestatement of our views as to whether it must be considered a side line or an end line. On this portion of the vein on the dip lying under the apex A G the ore was found (marked on the diagram "Ore bodies") which was the subject of this action. The defendant the Black Rock owner entered upon this portion of the vein and extracted the ore from the place as marked on the diagram. There was a contention in the case that these ore bodies were upon a vein other than that which
0140 apexed (if we may invent this verb) at A G—that is to say, upon another vein, the apex of which was on the Black Rock ground. But the findings were adverse to the Black Rock in this matter. We will not review that contention. For the purposes of this decision, the ore bodies in question were upon the vein the apex of which is indicated by the line A G, which lies wholly within the Niagara surface lines. The plaintiffs, being the owners of an undivided two-thirds interest in the Niagara, brought this action against the defendants to recover the two-thirds value of the ores so taken from the place above described. Plaintiffs obtained judgment for $27,242.54. The jury also found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode at the point marked A. Judgment was to this effect, as well as for the amount of money named above. A motion for a new trial was denied. The Black Rock people appeal from the judgment and from the order denying the new trial.

Geo. Haldorn, Robinson & Stapleton, and Smith and Word, for appellants.

John F. Forbis, for respondents.

DE WITT, *J.* (after stating the facts):

This case was tried in the district court after the decision
0141 of King *v.* Amy & Silversmith Min. Co., 9 Mont., 543; 24 Pac., 200, and before the reversal of that decision on appeal to the United States Supreme Court (152 U. S., 222; 14 Sup. Ct., 510). The case was tried upon the assumption that the law as attempted

to be declared in 9 Mont. was correct. The district court instructed the jury upon this theory, and the judgment gave to the Niagara people the two-thirds value of the ore taken by the Black Rock east of the point where the apex of the vein passed entirely into the Niagara ground, namely, point A on the diagram. No exceptions to these instructions were preserved or specified so that they can now be reviewed; but since the trial of the case at bar and perfecting the appeal to this court the United States Supreme Court has reversed our decision in the Amy & Silversmith case. The Black Rock people argue that, although they are not now in a position to urge error in the instructions (that is to say, that which they now claim to be error by reason of the United States Supreme Court decision of the Amy & Silversmith case), still they can raise the same point upon the ground that the pleadings do not support the judgment. Their argument to this effect is that the pleadings, alleging the facts as detailed in the statement above, do not warrant the judgment under the law as decided by the United States Supreme Court in the Amy & Silversmith case.

0142 In other words, the Black Rock contends that under that decision, if the Niagara apex leaves the Niagara claim through a side line, as it does, the Niagera is limited, in following down the dip of the vein, to a perpendicular plane drawn downward through that side line—the line H B on the diagram—whereas the district court did not so limit them, but held in its judgment that the Niagara could take the ore on the dip of the vein under the apex A G and east of the point A, although such vein on its dip extended southward under the Black Rock north side line—that is to say, the district court gave judgment in accordance with the law of the Amy-Silversmith case in 9 Mont. and 24 Pac., which was declared not to be the law in the Amy-Silversmith case in 152 U. S. and 14 Sup. Ct. We will concede to the Black Rock that this question is raised by the pleadings, and we shall proceed to determine whether the Niagara or the Black Rock owns the ore in dispute taken from the place, marked "Ore bodies" on the diagram.

We shall not renew the discussion of the cases upon this question decided by the United States Supreme Court prior to May 21st, 1890, the date of our decision of the Amy-Silversmith case. Our

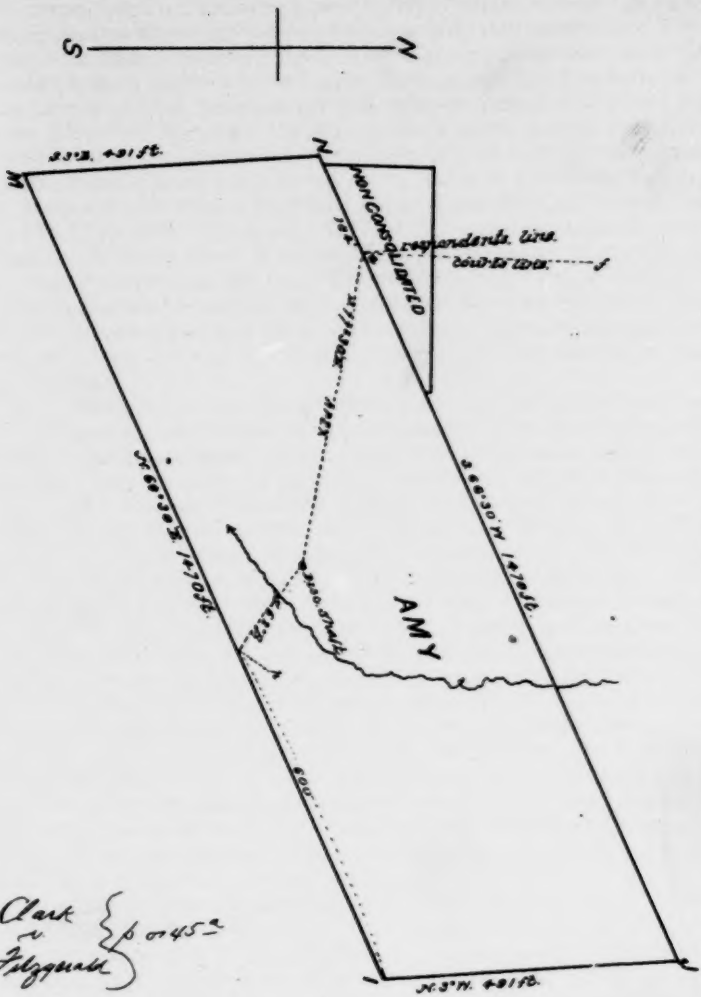
0143 best construction of those decisions is found in our opinion in that case. We there met the problem which had for years engaged the earnest attention of lawyers who had to do with mining litigation—*i. e.*, the preservation of the intent of the mining statutes when they are applied to a location *location* in which exploration has demonstrated that the apex and strike of the vein do not pass through both end lines of the location. We gave our best endeavor and research in that decision, and arrived at a result which we were willing to concede was not wholly in accord with the decisions of the United States Supreme Court upon that subject, but which we believed could, with a very little effort, be reconciled with those decisions, and which we were wholly satisfied was the only practicable working solution of the problem in all its phases, and which we were also wholly satisfied was fully within the intent of the United

States mining laws. Even with the profound respect which we in common with all courts entertain for the decisions of the United States Supreme Court, we think that there is no impropriety in saying, and that it is due to ourselves to say, that the longer we observe the daily operation of the mining laws in practical affairs
0144 the more satisfied are we that our decision of the Amy-Silversmith case was correct. We are strengthened in this opinion by the views of other courts, to which we shall hereinafter refer. But the United States Supreme Court is the court of last resort upon this subject, and our opinions, as a rule of decision, must be abandoned if they are in conflict with the declarations of the superior tribunal. If that court had given no further utterance upon this subject since its decision of the Amy-Silversmith case, we should feel that we must, however reluctantly, desert the principle which we sought to maintain in that case; but, as will be seen in the review of the cases below, that distinguished tribunal has given a hint that it is willing to reconsider the principle involved. Upon that hint we feel that we are justified in approaching the subject much as if it were *res integra* and without subjecting ourselves to the criticism of judicial insubordination.

But to the subject in hand. As noted above, we shall not go to the decisions back of our Amy-Silversmith opinion. 9 Mont., 543; 24 Pac., 200. We are satisfied with that discussion of the subject and the review of the authorities up to that date. We shall take up the subject as it has been developed since our decision in that case. The history of the discussion is found, chronologically, in the
0145 following cases: King *v.* Amy-Silversmith Min. Co. (May 21, 1890), 9 Mont., 543; 24 Pac., 200; Tyler Mining Co. *v.* Sweeney (Jan. 16th, 1893), 4 C. C. A., 329; 54 Fed., 284; King *v.* Amy-Silversmith Min. Co. (March 5th, 1894), 152 U. S., 222; 14 Sup. Ct., 510; Last Chance Min. Co. *v.* Tyler Min. Co. (April 9, 1894), 9 C. C. A., 613; 61 Fed., 557; Con. Wy. G. M. Co. *vs.* Champion M. C., 63 Fed., 540, Aug. 13, 1894; Del Monte Mining & Milling Co. *v.* New York & L. C. Min. Co. (March 13, 1895), 66 Fed., 212; Last Chance Min. Co. *v.* Tyler Min. Co. (April 15th, 1895), 157 U. S., 683; 15 Sup. Ct., 733. The cases cited above in 4 C. C. A., 54 Fed., 9 C. C. A., 61 Fed., and 157 U. S., 15 Sup. Ct., are different appeals and discussions of the same case. In the Amy-Silversmith case the apex of the vein crossed the claim as indicated in the diagram used in that opinion, and which is reproduced here, marked "figure 2."

(Here follows diagram marked p. 0145*a*.)

The vein dipped to the north. We held that the right of the Amy-Silversmith to follow the vein on the dip was bounded by a perpendicular plane extending into the earth at the point where the apex crossed the Amy-Silversmith north side line, the point marked *e* on the diagram, Fig. 2, and which plane was parallel to the end lines of the Amy-Silversmith claim and extending north of the Amy-Silversmith north side line.



Clark
vs
Fitzgerald

0146 We quoted section 2322, Rev. St. U. S., which is as follows: "The locators of all mining locations shall have the exclusive right of possession and enjoyment of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." We then said: "As said by Mr. Justice Field (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 206; 6 Sup. Ct., 1177), 'This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein.'

0147 We may add to these words that further difficulties arise when we are obliged to apply this statute to facts not wholly within its contemplation. If a mining location be made regularly—made so that the strike of the vein crosses the location from end line to end line and at right angles to said end lines—there is nothing in the statute to construe or interpret. Mining Co. *v.* Tarbet, 98 U. S., 469; Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 205; 6 Sup. Ct., 1177; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 485; 7 Sup. Ct., 1356. 'There is no patent or latent ambiguity.' But when veins or their strikes cross the side lines and a side line and end line at all conceivable angles difficulties confront the courts that can best be met by legislative aid. Until such aid is invoked the courts must follow the statute and previous construction as closely as the varying facts will permit. Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 208; 6 Sup. Ct., 1177. The history of mining has proven that the law of May 10, 1872, and amendments thereto do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar

0148 is a notable instance. It is a first impression in this court and all other appellate courts." After stating what we understood to be the meaning of the words "dip," "s-rike," etc., as used by miners and in the decisions, we further said: "The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries or which lies within perpendicular planes drawn downward indefinitely on the lines of these boundaries. The miner may follow the dip wherever it goes, provided he has the apex as the basis of operation, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the

vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location and of a depth as far as he desires or is able to work downward, and at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 205; 6 Sup. Ct., 1177." We have always been of opinion that this is the keynote of the interpretation of section 2322, Rev. St. U. S.—that is to say, if the miner has the apex in his location he is to have the vein,
0149 and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within its surface lines, whether that apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. This, in our opinion, is what section 2322 says in plain language.

Continuing further in the Amy-Silversmith case, we said: "It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all and only that portion of the solid contents of the earth included in a parallelopipedon formed by dropping vertical planes downward on the line of each side of such parallelogram, and the intent of the statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelopipedon indicated. Therefore, if the miner locates his claim regularly—that is, as the statute contemplates that he
0150 will—he has all that the statute intends to give him. See cases cited *supra*. If he will not or cannot make the explorations necessary or ascertain the true course of the vein and draws his end lines ignorantly, he must bear the consequences (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 207; 6 Sup. Ct., 1177—that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip." We are still of opinion that the loss which a miner should suffer, if he is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, should be the loss of so much length of the vein on the strike as by his irregular location he has failed to observe the length on the apex. If this be the consequence which he is to suffer by reason of his irregular location, he loses simply that which he failed to locate, and he does not lose the vein of which he has located the apex. That he is to have the vein when he has the apex, we believe is the intent of the mining law. Rev. St. U. S., 2322. We said further in the Amy-Silversmith case: "But in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will
0151 locate so that the strike shall pass through the middle of each

end line, leaving 300 feet of surface on each side of the vein, but the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days under our statute to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of opinion that the statute should be so construed as will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward." We then proceeded to review the contentions of counsel in the case and to discuss, as we understood them, the three leading cases in the United States Supreme Court, namely, Mining Co. *v.* Tarbet (the Flagstaff case), 98 U. S., 463; Iron Silver Mining Co. *v.* Elgin Mining & Smelting Co. (the Horseshoe case), 118 U. S., 196; 6 Sup. Ct., 1177; Argenting Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356.

0152 We then offered the following solution of the problem and decided the case upon the principle as found on page 575 of 9 Mont. and page 200, 24 Pac., as follows: "These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mold into which they were forced; but we believe that we may legitimately conclude from those cases that in the facts now before us the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth; but the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip in that portion lies under the apex of the Non-consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip and so operate at the point where the strike is ended.

0153 If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends—that is, at a point on the side line (point *e*, Fig. 2), and if it takes effect there its parallelism must not be destroyed.

We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east side line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent develop-

ments. The parallelism of the end-line planes is fixed by location and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluable upon this theory. The intent of the statute seems to be secured." As noted in the
0154 Amy-Silversmith case, the difficulties arise in applying the United States mining statutes to accidentally irregular locations—that is, locations where it is developed in time and by explorations that the apex and strike pass through the side lines or a side line and an end line (as in the case at bar), or enter and pass out of the same side line. We essayed in that case a solution of this difficulty which could be applied to every irregularity and which would secure absolute uniformity in all complications and give to every mining location, as the statute intended and declared, the whole vein, in its whole depth, to the extent of the length of the apex which was located. We thought that we had accomplished that result. With due deference to those who have differed from us, we think so still.

The principle which we sought to maintain in the Amy-Silversmith case found its first approval in an appellate court in Mining Co. *v.* Sweeney, 4 C. C. A., 329; 54 Fed., 284. In that case the United States circuit court of appeals, ninth circuit, discussed the extralateral rights of a location where the apex and strike passed through a side line and an end line. The situation differed from that of the Amy-Silversmith case, as in that case the apex
0155 and strike passed through both side lines. But we understand that the circuit court of appeals approved the principle of our decision in the Amy Silversmith case, for the opinion by Judge Hawly, a veteran lawyer and judge in the mining regions, says: "Here the location of the Tyler was properly made in the form of a parallelogram along the course of the lode or vein. The road extends from the northwesterly end line for a distance of nearly 1,100 feet within the side lines of the surface location, and then so changes its course as to cross the southerly side line into the Last Chance location. The learned justice who wrote the opinion in the Horseshoe case (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., *supra*), when he said that the parallelism of the end lines 'is essential to the existance of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that the lode should extend in its length from one end line to the other of the location. If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler, near the point where in fact it crossed the line, there could certainly be no question as to
0156 the right of the Tyler to follow the lode or vein in its downward course for its entire depth our side of the vertical planes drawn through the side lines. The fact that it continued its course and crossed the side lines does not in any manner change its prin-

ciple. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice, and authority, it seems to us is the only reasonable construction that can be given to the statute. Whenever and in whatever manner this point has been presented by any similar facts, the rulings of the courts have been substantially in accordance with the views we have expressed. Golden Fleece G. & S. M. Co. *v.* Cable Consol. G. & S. M. Co., 12 Nev., 313; Doe *v.* Sanger, 83 Cal., 203; 23 Pac., 365; Kahn *v.* Mining Co., 2 Utah, 174; King *v.* Amy-Silversmith Min. Co., 9 Mont., 543; 24 Pac., 200. In the case last cited the lode crossed the surface lines without reaching either end line as marked on the surface, and the court held that, where

a lode or vein crosses the side line of a location,

0157 the strike is determined by the plane of such side line,

and the right to follow the vein on its dip is determined by a vertical plane parallel to the end lines drawn downward, and which takes effect at a point where the apex intersects the side line. The court, in its opinion, after reviewing the Flagstaff case, 98 U. S., 463; the Argentine case, 122 U. S., 478; 7 Sup. Ct., 1356, and the Horseshoe case, 118 U. S., 208; 6 Sup. Ct., 1177, and pointing out the differences existing between them and the Amy case, and stating the various contentions of counsel, said: * * *" The opinion of Judge Hawley then quotes the Amy and Silversmith case (9 Mont. and 24 Pac.) as to the principle therein announced. That case went back for trial and appeared again in the circuit court of appeals as The Last Chance Min. Co. *v.* Tyler Min. Co. (April 9, 1894), 9 C. C. A., 613; 61 Fed., 557, and in the opinion the court adhered to the principle of the Amy-Silversmith case. In the meantime the Amy-Silversmith case had been reversed by the United States Supreme Court, March 5, 1894 (152 U. S., 225; 14 Sup. Ct., 510), but that decision is not mentioned in the Last Chance case (9 C. C. A. and 61 Fed.), and does not seem to have

been considered by the circuit court of appeals. That court

0158 said: "The right of each party to follow the lode on its strike

or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler and Last Chance locations, but each company would have the right to follow the lode the top or apex of which is within its surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the lode ended—that is, at the point where the lode in its lengthwise course intersects the side lines of the claims. The Tyler would be entitled to all that portion of the lode that lies westerly of such vertical line drawn downward, and the Last Chance would be entitled to all that portion of the lode easterly of said line." See, also, Con. Wy. G. M. Co. *vs.* Champion M. Co., 61 Fed., 540.

As the United States Amy-Silversmith decision was not men-

tioned in 9 C. C. A. and 61 Fed., although preceding it in time, we may treat the United States decision as being subsequent. In that case, after stating the facts and the contentions, the United States Supreme Court said: "Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and also
the exclusive right of possession and enjoyment of all
0159 veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extending downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines extended downward vertically, therefore, determine the extent of the claim, except when in its descent the vein passes outside of them and the outside portions are to lie between vertical planes drawn downward through the end lines. The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim the lines marked as side lines cross the course of the strike of the vein and do not run parallel with it. They therefore constitute end lines. It is true the lines are not drawn with
the strict care and accuracy contemplated by the statute, and
0160 which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments, but, as was said in this court in Iron Silver Min. Co. *v.* Elgin Mining and Smelting Co., 118 U. S. 196; 207 S. Sup. Ct., 1177, 'if the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein and draws his end lines ignorantly, he must bear the consequences.' The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are, in fact, end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law. Acting upon this principle, there is no lateral right to the holder
of the Amy claim by which he can follow its vein into
0161 the Non-consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made 'to ascertain, as near as possible, the

course and direction of the vein. * * * Even then,' the court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein; but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location then that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine-workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in the titles to mining claims.' Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owners right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side line of its claim
0162 as that side line, so called, was, in fact, one of its end lines."

We understand that the United States Supreme Court not only reversed our judgment, but discarded as untenable the principle upon which we pronounced it. This decision was received with regret, not only by the bench and bar in the mining regions, but by both practical and scientific miners. This regret was greater in that the decision emanated from, as we said in the Amy-Silversmith case, "Mr. Justice Field, the judicial father of the mining law in the United States," a jurist who has illuminated this topic of the law by not only his profound learning, but by his practical experience in mining affairs. As an indication of the reluctance with which courts inferior to that of the United States Supreme Court have accepted the reversal of the principle of the AmySilver-smith case, we notice the case of Del Monte Mining and Milling Co. *v.* New York & L. C. Min. Co. (Cir. Ct., D. Colo., March 13, 1895), 66 Fed., 212. In that case the court had before it the conditions of an apex and strike passing through an end line and side line. Judge Hallett, district judge, to whom courts and councel in the mining regions are greatly indebted for his learning, which has been applied to this class of litigation, said: "If the strike of the lode in the
0163 New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the Supreme Court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and if this proposition be accepted the south end line and east side line, intersected by the outcrop of this lode, are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of law in the Supreme Court or in any court, so far as we are advised. It is true that in

the Flagstaff case, 98 U. S., 463, and recently in the Amy and Silversmith case, 152 U. S., 223; 14 Sup. Ct., 510, the Supreme Court declared that the side lines of a location shall be end lines whenever the lode on its strike crosses such lines; but these decisions
0164 do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location and within its side lines a distance of 1,070 feet. It is conseded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstances that the location extends in a north-ly direction about 280 feet beyond the point where the lode diverges from the side lines. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere because the court cannot make a new location or in any way change that made by the parties. Iron Silver Min. Co. *v.* Elgin Mining and Smelting Co., 118 U. S., 196; 6 Su*t*. Ct., 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recog-
0164½ nized without drawing any line, and if there be magic in the word 'line' it will be better not to use it. In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the south end line procured. In this proceeding there is no departure from the end lines of the New York location as fixed by the relator and there is no new line of location drawn for any purpose whatever. We keep entirely within the end line of the location, as required by the statute, and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of 1,000 feet (which is not an extraordinary occur-ance) a location shall be made of the length of 1,500 feet, extending 250 feet in each direction beyond the ends of the lode, would any one deny the right of the locator to follow the lode within his
0165 end lines upon the ground that the lode did not cone to either of such lines? I think not. The case is not different when the lode intersects one end line and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining territory so far as he may within his end lines and so far as he holds the

outcrop in his location. Upon this construction of the statute respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location." It is also true that in Judge Hallett's case the facts differ from the Amy and Silversmith in that the apex crossed a side line and an end line instead of two side lines, as in the Amy-Silversmith case. But Judge Hallett applied the principle of the Amy-Silversmith and he so applied it after, as we understand, the United States Supreme Court had repudiated it.

One month after Judge Hallett's decision—that is, on April 15, 1895—appeared the decision in the United States Supreme Court in Last Chance Min. Co. *v.* Tyler Min. Co., the case which
0166 we have formerly encountered in 54 Fed., 4 C. C. A., and 61 Fed., 9 C. C. A. See 157 U. S., 683; 15 Sup. Ct., 733. The case was decided in the United States Supreme Court without it being necessary to treat the question of the apex and strike passing through an end line and a side line; but as to this matter the court said: "Our conclusions in this respect obviate the necessity for considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end lines. Of course if the latter is a valid location the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line; but if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extending downward? It has been held by this court in the cases heretofore cited that where the course of a vein is across instead of lengthwise of the location the side lines become the end lines and the end the side lines; but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a
0167 side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to persue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines? If the common-law rule as to real estate obtains in such a case, then of course on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any of its boundary lines; and even if the amended application is perfectly valid the question would arise whether the rights acquired under it related back to the date of the original location or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question it is unnecessary to consider this." Mr. Justice Brewer

wrote the opinion. There was no dissent. We assume that Mr. Justice Field concurred. The fact that the United States Supreme Court said in this case (with the justice concurring who wrote
0168 the Amy-Silversmith decision) that it had never given any decision as to what extralateral rights exist if a vein enters at an end line and passes out at a side line we think is a sufficient warrant to us to reopen the discussion as to what principle of decision should apply in these irregular locations.

We can see but two solutions of the difficulty presented in this case: One is to say that when the apex and strike cross a located side line that such side line becomes an end line, in accordance with what we understand to be the decision in the Flagstaff case and in the Amy-Silversmith case in the United States Supreme Court. The other is to apply the Amy-Silversmith doctrine as announced — 9 Mont.; 24 Pac. We will examine what seems to us to be the legitimate results of the first proposition. Turning again to the diagram, figure 1, the located east end line of the Niagara claim must still remain an end line. It was located as such, if that means anything, and the apex and strike pass through it, which fact, under any view, means everything; so this line is and must remain an end line. Then we have the south side line of the Niagara; also an end line, because the apex and strike pass through it. So we have two end lines not parallel to each other, but at
0169 an angle to each other not far from a right angle; but the end lines must be parallel. The result is that the Niagara cannot follow its dip at all; but the statute says it may follow the dip. These difficulties do not come to us at all as a surprise. We clearly foresaw them, and pointed them out in the Amy-Silversmith case. 9 Mont., 571; 24 Pac., 200. Thus we find that the Niagara claim, under these views, must be relegated to the common law. It owns downward inside of the perpendicular planes of its surface lines. But this result is not the intent of the law (sec. 2322, R. S. U. S.). The intent is that the locator shall have the right to the vein throughout its entire depth if the apex lies within its surface lines, although the vein on its dip downward departs from the perpendicular, so as to extend outside of the side line. By calling this side line an end line the whole intent of the statute is destroyed and we go back to the system of the Spanish law (9 Mont., 567; 24 Pac., 200), which was deserted in the adoption by Congress of the American mining laws. For example, again, in this case reverse the direction of the dip and assume that it goes north, then the Niagara people would take all of the vein between the downward claims of the end line and side lines, the lines E F and E H on the diagram. They would get a fan-shaped section of the vein, rapidly increasing in size with every foot downward—that is to say, such would be the result unless we adhere to the common-law rule and have no extralateral rights at all. The plain fact is that to call the side line an end line in this case
0170 leads us into consequences that totally upset the whole intent of the law. We cannot subscribe to any such doctrine. These contemplations are not at all new to us. We pointed out

these difficulties and absurdities in the Amy-Silversmith case, and we then hoped that they would not again threaten the disturbance of the rights intended to be given by the mining statutes. We feel now, as we did in the Amy-Silversmith case, that we are not able to take the responsibility of any such destructive construction. And why, indeed, should a located side line be converted into an end line by a court? The locator never so intended it. He made the side line the long line, 1,500 feet in length, intending it to be generally parallel to the vein. The law never intended that such a side line should be an end line. If the side line is to become an end line and the end line a side line, then the court, working this readjustment of the lines, puts the side lines at a distance from the center of the lode much greater than 300 feet. What would be done with those lines and this extra service taken in by them? Shall they be left so that they will include 1,000 or 1,500 feet in width when the law intended the locator should have 600 feet only,
0171 or will these judicially created side lines be drawn in, and thereby new side lines made by the court? But "the court cannot become the locator for a mining claimant." Amy-Silversmith case, 152 U. S., 228; 14 Sup. Ct., 510. The further we follow this doctrine into its details the more untenable it appears. We shall abandon its pursuit and leave its reconciliation to reason, law, an- the intent of the statute and practical application to others, who may be more skillful in making a reasonable construction.

As we leave this confusion and turn to the other solution—that of the Amy-Silversmith case, 9 Mont. and 24—difficulties disappear and there is light upon the whole path. We can, then, do as the United States Supreme Court said in the decision in the Amy-Silversmith case, on page 228, 152 U. S., and page 510 14 Sup. Ct.: "The most that the court can do where the lines are drawn inaccurately and irregularly is to give to the miner such rights as his imperfect location warrants under the statutes." That is to say, we can give to the miner, or rather the law as we construe it gives to the miner, as much length of strike, no matter how deep he goes upon the dip, as he has length of apex, and he loses in strike and dip only what he has failed to get in apex. That is what the district court in this
0172 case following the Amy-Silversmith case, 9 Mont., 543; 24 Pac., 200, accomplished. It gave to the Niagara the ore on the dip east of the point where the apex and strike crossed the south side line of the Niagara. This is what the circuit court of appeals did in Tyler Mining Co. *v.* Sweeney, 4 C. C. A., 329; 54 Fed., 284, and Last Chance Min. Co. *v.* Tyler Min. Co., 9 C. C. A., 613; 61 Fed. 557. This is what the circuit court of the district of Colorado did in the Del Monte Min. Co. *v.* New York & L. C. Min. Co., 66 Fed., 212. This is what we understand the United States Supreme Court suggested in Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S., 683; 15 Sup. Ct,, 733, that it might do. The language of Judge Hawley and Judge Hallett in those decisions is very apt when they suggest that if the apex and strike broke off abruptly at the side line would any one contend that the dip could not be followed within the end lines? And why should it not also, as well, be followed if the strike

instead of physical- ceasing to exist at all simply cease to further exist within the Niagara lines? We can think of no good reason which would allow the owner to follow the vein on the dip in the
suppositititious cases and deny him that right in the actual
0173 case. In the Amy-Silversmith case we spoke of the end-line
plane taking effect at the point where the strike, in fact, ended. By this ure of the words "end line" perhaps we give opportunity for the contention that we were moving an end line and locating it at a place other than that fixed by the locator. We endeavored to make it clear that we were not moving an end line, but we were simply giving it effect at the only point where it could operate. But, as Judge Hallett says, if there is any magic in the word "line" we will not use that word. Perhaps we can more effectively describe the principle for which we contend as follows: Put one side of a square on the located east end line of the Niagara (the line B D, Fi*b.* 1) and let the other end of the square be long enough to reach the point where the strike and apex leave the Niagara ground (point A, diagram); then run this square up and down the line east end line (line D B, diagram) and that line extended south and run the square all over the perpendicular plane of this line, then the successive points which the long end of the square reaches will be the points beyond which to the west the Niagara people may not follow the vein on the dip, and beyond which to the east
the Black Rock people may not come. Thus the Niagara is
0174 keeping upon the dip of the vein within its end lines and it is
not following the strike of the vein outside of any line. The principle might also be further illustrated by imagining a pair of draftsman's parallel rulers. One ruler is placed on the east end line of the Niagara (the line B D). Its parallel is pushed out to the point where the apex crosses the side line (the point A) and set. The plane dropped perpendicularly from the westerly ruler would form the boundary between the Niagara and the Black Rock on the dip of the vein.

Of course, we understand the difference between the doctrine of the United States Supreme Court, which commences with the Flagstaff case and receives its last treatment in the Amy Silversmith case, and our theory which we held in the Amy Silversmith case. The Supreme Court doctrine seems to be that the side lines, which are marked as such on the ground, namely, the 1,500-feet lines as the side lines and the 600-feet lines as the end lines, are not in fact the side lines and end lines, but what are the side lines and the end lines is to be determined by the subsequent demonstration of where the apex and strike cross the locator's lines. The trouble with the theory is that it leaves the determination of the boundaries to subsequent development, which may require years, and it calls
0175 that an end line which was never located as such and it
makes the side lines 600 feet long only, when the statute says they may be 1,500, and makes the end lines 1,500 feet long, when the statute says they shall not be over 600, and it gives a surface of more than 300 feet on each side of the center of the lode. We cannot be persuaded to think that this is the intent of the statute. As we

noted in the Amy-Silversmith case, the difficulties of this construction did not fully appear in the Flagstaff and Argentine cases, where, as we understand, the strike and apex of the vein were practically at right angles to the length of the location. 9 Mont., 574; 24 Pac., 200. But the theory meets great difficulty when applied to veins which have a general course lengthwise of the location and which happen to slip out of the location by a side line before the end line is reached.

Again, we fully understand that the situation in the case at bar and the Tyler case and the Del Monte case differs slightly from that of the Amy-Silversmith case. In the Amy-Silversmith the vein passed through two side lines. In the case at bar and the other cases it passes through a side line and an end line; but we contend that the same reasoning applied to both situations—that is,
0176 that the miner shall have as much vein in length on the strike, at all depths to which he may go on the dip, as he has length of apex within his surface lines. We cannot too strongly emphasize our opinion, even at the expense of tiresome reitteration, that this is the intent of section 2322, Rev. St. U. S., and the true interpretation of the decisions thereunder. We believe that this doctrine should be applied to both situations. On the other hand, if the other doctrine is to be applied to one situation, why not to both? For it does not seem to us consistent to say that the dip of the Amy-Silversmith must be cut off at their north side line, and that the Niagara may go beyond their south side line, simply because the Niagara vein, on its eastward course on the strike, goes out through an end line instead of a side line; but when we undertake to apply the United States Flagstaff and Amy-Silversmith doctrine to the case at bar we find that the Niagara cannot follow its dip out of any of its lines, and it is cut down to the common-law rule of "*ad coelum et ad orcum.*" What we contend for is a uniform construction of the law; a construction which will give the vein on the dip to every locator who has the apex in his location, and not give it to one who has the apex and withhold it from another who
0177 as fully has the apex; that shall give it to the Amy-Silversmith and the Niagara as well. Let us do this, and make estates in mines uniform under the law. This seems to us more reasonable than to apply a construction which will give to one locator the estate which the law contemplates and deny it to another.

The United States Supreme Court, in Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S., 683; 15 Sup. Ct., 733, observing the possibility or probability of being at some time obliged to apply its Flagstaff and Amy-Silversmith rule to the situation of a vein passing through a side line and an end line, seemed to shrink from the consequences of the doctrine (consequences which we pointed out in our opinion in the Amy-Silversmith case, 9 Mont., at page 571; 24 Pac., 200), and stated that they had never decided what extralateral rights existed in such a situation. They also said: "May the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may

go, within the limits of some equitably created end lines?" We propose now just such an equitable doctrine, the same one that we proposed in the Amy-Silversmith case, and one wholly within the intent of section 2322, Rev. St. U. S. We have hereinbefore, and especially in the Amy-Silversmith case, given the reasons for our belief that such a doctrine can, by
0178 a slight effort, be reconciled with the former decisions of the United States Supreme court, and that, as Judge Hawley said in the Tyler case, 4 C. C. A., 329; 54 Fed., 292, "this, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute." We now feel at liberty to follow our convictions and our belief that our view of the law is correct, by reason of the indication given by the United States Supreme Court (157 U. S., 695; 15 Sup. Ct., 733) that they are willing to reconsider (or, as the court puts it, consider) this important principle in the construction of section 2322, Rev. St. U. S. We shall accordingly adhere to the principle of our Amy-Silversmith decision and hold in this case that the judgment of the district court was within the law when it gave to the Niagara people the ore found in the dip of the Niagara vein south of their south side line and east of the point where the apex and strike of the Niagara vein crossed the bounding side line between the Niagara and the Black Rock.

The appellants also rely upon some alleged errors in the instructions. It is contended by respondents that the errors in the instructions are not properly excepted to. Respondents cite
0179 cases from this court upon that subject; but we think the proper contention should have been as to whether the errors were specified on the motion for new trial. We are not satisfied that the specification was insufficient. We shall not, however, pass upon that question, as it has not been clearly or fully argued, and the question of practice is a delicate and troublesome one, but will proceed to an examination of the instructions. Our doing so cannot be a matter of complaint to the respondents, for our examination of the instructions has satisfied us that there is no error therein. We will briefly review them. Appellants complain that the court instructed the jury in reference to following a vein on its dip beneath the surface, but did not in this instruction inform the jury as to the matter of the parallel end lines. If the appellants mean that the court did not instruct as to the parallelism of the end lines as located, it is sufficient to reply that no contention was made upon this point. The parallelism of the located end lines is conceded, and the court, having adopted the Amy-Silversmith doctrine of this court, proceeded, of course, upon the theory that the original end lines continued to be the end lines.

0180 The Black Rock people contended upon the trial that the "ore bodies" in question were upon a vein the apex of which was wholly within the Black Rock ground. This was called the "Stoner vein." The apex of the Stoner vein, it appears, was on the Black Rock ground. One of the great contentions of fact in the case was that the Stoner vein, from its apex down to the ore bodies,

was a continuous vein. Upon this contention, as noted in the statement of the case, the Black Rock failed. It seems to have been established by the decision that the Stoner vein was not continuous to the "ore bodies." In instructing the jury upon this contention, the court gave them the following: "If you find from the evidence that what has been called in the evidence the 'Stoner vein' is a separate and distinct vein from what is called the 'Niagara vein,' and that the apex of said Stoner vein is inside the boundaries of the Black Rock claim, and also find that said Stoner vein connects with said Niagara vein at some point below the surface of the ground, and that such connection is made by following a continuous streak or body of quartz or ore, or by passing through vein-matter as devined in these instructions, *or by following such material or indications as a practical miner would follow with the*
0181 *expectations of finding ore*, then in such case defendants are entitled to and are the owners of all quartz, ore, and mineral-bearing rock contained in such vein below the said point of intersection, and plaintiff cannot recover therefor, it being conceded that the Black Rock Lode vein owned by defendants is older and was located and patented prior to the time when the Niagara claim was located or patented." This instruction, as we have just quoted it, was that submitted. The court, in giving it, struck out the portion which is in italics. Appellants complain of error in striking out that portion. We think in this the court was correct. The question is a geological one—that is, whether the Stoner vein in its downward course connected with the Niagara—and the court instructed how such connection would be made—that is, by following a continuous streak or body of quartz or ore or by passing through vein matter as defined in the instructions. This was a question of geology and of facts in nature. It would have *have* left it to the jury entirely too indefinitely to have told them that they could find a continuous body of ore by following such indications as a practical miner would follow with the expectation of finding ore. We do not think that this is the method by which geological facts can be established. The application of such
0182 language as this, which was stricken out of the instructions, must not be confused with the use of similar language in reference to finding ore sufficient to support a location of a mine. When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work (Shreve *v.* Copper Bell Mining Co., 11 Mont., 309; 28 Pac., 315, and cases therein reviewed), it is a very different question from telling a jury that the geological fact of the continuity of a vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity.

Objection is made to instruction No. 15 in that, as it is contended by counsel, the court assumed that the respondents had established a right to recover. But the court did make this assumption. The instruction opens with the following language: "Plaintiffs having

the burden of proof, they must esta-lish the material allegations of their complaint by a preponderance of evidence."

Another instruction objected to by appellants is as follows: "In estimating the value of the ore extracted from the Niagara
0183 claim you will take as a basis therefor the market value of such ores on the dump of the claim, after deducting the cost of mining and hoisting the same." The objection which appellant makes to this instruction, as he states it in his brief, is that he was not a trespasser and was entitled to his actual expenses in extracting and treating the ore, provided the expenses are reasonable and as low as the work could be done. He cites us to a number of cases involving questions of accounting between cotenants when one tenant has made necessary improvements on premises or has extracted ore therefrom. We are of opinion that the instruction places the appellant upon precisely the ground which he himself claims. The court says that the basis of computation shall be the market value of the ore on the dump after deducting the cost of mining and hoisting the same. By the instruction the appellant is given credit for the cost of mining and hoisting, just as he claims should be. Furthermore, we think that the instruction, by its only reasonable construction, gives the appellant the expense of smelting and reducing the ore. The court says that the basis shall be the market value of the ore on the dump. What is market value? It is certainly that price for which the ore could reasonable be sold on the market. That market value
0184 would in the mind of a buyer be necessarily determined by deducting the cost of reducing the ore—that is to say, if a purchaser compute what he would give for the ore he would figure the value of the same on the dump, and then he would deduct from that value the cost of reducing the ore to bullion, and, having deducted that cost, he would make a bid for the ore, and this would constitute the market value. No one could possibly contend that the market value of crude ore was the value of fine silver in such ore. On the other hand, the market value would be the value of fine silver, less the expense of getting such silver out of the ore. We are satisfied that the instruction was in fact precisely what the appellant claim- it should be.

Appellants object to the refusal of the court to give the following instruction: "The jury are instructed that if they believe from the evidence that the side lines of the Niagara location are practically perpendicular to the vein, then the side lines of said location become the end lines, and the plaintiffs cannot claim the du-p beyond the side lines." But there was no evidence whatever in the case and no contention to support any such instruction. The side lines of the Niagara not only are not practically perpendicular to
0185 the vein, but they are practically not far from parallel to the same. There were no facts in the case to warrant the giving of such an instruction.

Appellants also urge error in the exclusion of certain testimony of a witness, William E. Hall, offered to be introduced. Mr. Hall was a practical miner. He testified to what is known as the "Rain-

bow lode," in the Butte district. He said that it was his opinion that the vein on the Black Rock was a part of or an extension of the Rainbow lode. He had examined the Black Rock mine. He saw a fault in that mine. Appellants then offered to prove by Mr. Hall that he had worked five claims on the Rainbow lode, and that the faults which he had found on the Black Rock are characteristic of the Rainbow vein. The testimony was objected to, the respondents stating that if the appellants intended to prove that this fault in the Black Rock extends to the Alice mine, with which mine Mr. Hall was familiar, they would not object. Appellants stated that they did not intend to prove this. The court sustained the objection, remarking, "If it is for the purpose of attempting to show a condition of affairs here (that is, in the Black Bock) by comparison of what exists in the Alice or in any other ground outside, unless it is
0186 shown that there is a continuity between the conditions which exist there and the conditions found in this ground," the evidence will not be admitted. The objection was sustained. We are of opinion that the learned judge of the district court stated the reasons for excluding the testimony as completely as we could set them forth. The subject under consideration in Mr. Hall's testimony was a fault in the Black Rock vein. One certainly could not prove the existence of a fault in one vein by showing that there were other and disconnected faults in another vein which the witness claimed was a continuity of the vein under consideration without showing any continuity in the fault.

Again, appellants contend that the judgment should be reversed, because the appellants' counsel were not present when the verdict was rendered, and thus had no opportunity to poll the jury. Appellants' counsel had made arrangements with the bailiff that when the jury agreed upon a verdict he, the bailiff, should call counsel. This was a matter wholly out of the court, and had no place in the proceedings of the court. It appears that the jury came in at a time when all the counsel were absent. The bailiff omitted to send for appellants' counsel. The counsel made the bailiff his
0187 agent for this purpose, and if such agent omitted to do that which he agreed to do we are not prepared to reverse this case for that reason. When it is the fact that counsel had the privilege of being in the court, if he wished, when the verdict was received, and his accidental absence at that time was not owing to any order or any action of the court, or any conduct by the counsel or parties on the other side, we shall not reverse this judgment for any such reason.

Another ground set up for the granting of a new trial is the alleged misconduct of Juror Hess. Hess makes an affidavit that he was ill, and that he agreed to the verdict in order to get discharged from service. But this juror never made any complaint to the court of his illness. When the jury came in and rendered its verdict he said nothing to the court, and there was no intimation that he was ill or needed any medical attendance. His alleged illness, and thereby his alleged coersion into the verdict, never appeared until after his discharge and his making an affidavit for the benefit

of the appellants. The case was an equity one, the findings were advisory, and the district court very properly disregarded this juror's affidavit given to impeach his own verdict.
0188–1035 Gordon *v.* Trevarthan, 13 Mont., 387; 34 Pac., 185. It is also attempted to be shown in Juror Hess' affidavit that the bailiff in charge of the jury was guilty of a misconduct. The story that Juror Hess tells about the conduct of the bailiff bears upon its face all the appearances of absurdity. Perhaps the district court would have been perfectly justified in disbelieving Hess' statements in regard to the bailiff without any contradiction, but the affidavit was contradicted in many respects. The district court was perfectly justified in paying no attention to the showing attempted to be made by the Hess affidavit.

Having reviewed all of the questions raised in this case, it is ordered that the judgment and the order denying a new trial be affirmed.

WILLIAM H. DE WITT,
Associate Justice.

We concur.

W. Y. PEMBERTON,
Chief Justice.

WILLIAM H. HUNT,
Associate Justice.

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1036 In the Supreme Court of Montana.

WILLIAM FITZGERALD *et al.*, Plaintiffs and Respondents,
vs.
WILLIAM A. CLARK *et al.*, Defendant- and Appellant-.

The Answer of the Judges of the Supreme Court of Montana.

The record and proceedings of the complaint, whereof mention is within made, with all things touching the same, we certify, under the seal of our supreme court of the State of Montana, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of Supreme Court of Montana.

1037 In the Supreme Court of Montana.

WILLIAM FITZGERALD *et al.*, Defendant- in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.
} Certificate.

UNITED STATES OF AMERICA,
State of Montana, } *ss:*

I, Benjamin Webster, clerk of the supreme court of Montana, do certify *that* the foregoing 1224 pages, from 01 to 0188 and from 1 to

1036, to be a full, true, and correct copy of the record and all the proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of the supreme court of Montana this the 15th day of February, A. D. 1896.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of the Supreme Court of Montana.

1038 In the Supreme Court of the United States.

WILLIAM F. FITZGERALD *et al.*, Defendants in Error,
vs.
WILLIAM A. CLARK *et al.*, Plaintiffs in Error.
} Stipulation.

It is hereby stipulated and agreed by and between the attorneys and solicitors of the respective parties in the above-entitled cause that the clerk of the Supreme Court may omit from the printed record in said cause all portions thereof except the following, to wit:

Pages 07 to 033, both inclusive, and pages 0121 to 0188, both inclusive, in volume 1 of the Record, and pages 1036 and 1037 in volume 2 of Transcript; and it is agreed that the above-specified pages of the transcript present fully all the issues to be determined by the court, and that the plaintiff in error relies upon the errors assigned in said record and transcript.

This March 2nd, 1896.

JOHN F. FORBIS,
Attorney and Solicitor for Defendants in Error.
ROB'T B. SMITH,
ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

1039 [Endorsed:] Case No. 16,233. Supreme Court U. S., October term, 1897. Term No., 145. Wm. A. Clark, P. E., *vs.* Wm. F. Fitzgerald *et al.* Stipulation as to printing record. Filed March 20, 1896.

Endorsed on cover: Case No. 16,233. Montana supreme court. Term No., 145. William A. Clark, plaintiff in error, *vs.* William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis. Filed March 20, 1896.